EDITOR'S NOTE

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86-924

NO. ____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

NETTIE JORDAN, Petitioner

v.

JOHN SCHROEDER, as Personal Representative of the Estate of HERMAN SCHROEDER, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE WASHINGTON STATE COURT OF APPEALS

Michael J. Trickey
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(206) 365-4300
Counsel of Record for Petitioner

August 13, 1986

48 pgs

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QUESTIONS PRESENTED

Whether the Petitioner, Nettie Jordan, was denied her right to a fair civil jury trial under United States Constitution Amendment VII and denied her right to due process under United States Constitution Amendment V and Amendment XIV because her retained counsel failed to adequately prepare witnesses, failed to pursue opposing counsel's waiver of the Deadman's Statute under Washington State law, and offered exhibits containing inadmissible hearsay, all of which severely prejudiced her case?

LIST OF PARTIES

The parties to the proceeding below were the Petitioner, Nettie Jordan, and the Respondent, John Schroeder, as Personal Representative for the Estate of Herman Schroeder.

TABLE OF AUTHORITIES

Rules and Regulations

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IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1986

NETTIE JORDAN, Petitioner

v.

JOHN SCHROEDER, as Personal
Representative of the
Estate of HERMAN SCHROEDER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
WASHINGTON STATE COURT OF APPEALS

The Petitioner, Nettie Jordan, respectfully prays that a Writ of Certiorari issue to review the judgment of dismissal of Petitioner's appeal in the Washington State Court of Appeals entered May 15, 1986 after

denial by the Washington State Supreme Court of Mrs. Jordan's petition for review of an interlocutory order of dismissal.

OPINIONS BELOW

The Court of Appeals of the State of Washington Commissioner's ruling granting the motion on the merits pursuant to Washington State Rules of Appellate Procedure was not reported and is reprinted in the Appendix hereto at p. 1a, infra.

The order of Division I of the Court of Appeals of the State of Washington denying Petitioner's motion to modify the Commissioner's ruling is reprinted in the Appendix hereto at p. 9a, infra, and the notation order of the Washington State Supreme Court denying the petition for review of that order is reprinted in the Appendix hereto at p. 10a, infra.

The Supreme Court of Washington's judgment of dismissal entered after that

court's denial of Mrs. Jordan's petition for review is contained in the mandate issued May 15, 1986 and is reprinted in the Appendix hereto at p. 11a, infra.

JURISDICTIONAL GROUNDS

On August 31, 1984, judgment upon a jury verdict on behalf of the Respondent was entered in King County Superior Court of the State of Washington, from which the Petitioner, Nettie Jordan, appealed to the Court of Appeals of the State of Washington. Respondent then filed a motion to dismiss the appeal on the grounds that the appeal was clearly without merit under the Washington State Rules of Appellate Procedure 18.14(e). On January 31, 1986, the state Court of Appeals Commissioner Larry A. Jordan granted Respondent's motion to dismiss. On February 27, 1986, the state Court of Appeals denied Mrs. Jordan's motion to review and modify Commissioner Jordan's order. On

May 6, 1986, the Washington State Supreme Court also denied Mrs. Jordan's petition for review of the denial. The Washington Supreme Court entered its judgment of dismissal of the appeal by its mandate dated May 15, 1986. Jurisdiction of this court to review the state Court of Appeals' decision is invoked under 28 U.S.C. §1257(3). Since, under Washington State Rules of Appellate Procedure, the Washington State Supreme Court's judgment of dismissal was not entered until issuance of the mandate on May 15, 1986, this petition for a writ of certiorari is timely within the meaning of Rules 20.2, 20.4 and 28 U.S.C. §2101(c).

STATUTES INVOLVED

28 U.S.C. §1257(3) Jurisdiction over State Courts.

The Supreme Court of the United States has jurisdiction to review decisions of state courts: " . . . by Writ of Certiorari . . .

where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties, or statutes of or commission held or authority exercised under the United States."

STATEMENT OF THE CASE

The Petitioner, Nettie Jordan, began seeing Herman Schroeder, M.D., in 1967 because she was concerned about the length and severity of her menstrual period. Initially Dr. Schroeder prescribed Theelin, an injectible hormone of estrogen, for her excessive bleeding from May, 1967 through November 29, 1971. On February 21, 1974, Dr. Schroeder performed a complete abdominal hysterectomy and a bilateral salpingo-oopherectomy removing her uterus, fallopian tubes and ovaries in the surgery. Mrs. Jordan did not consent to the removal of her ovaries. Dr. Schroeder did not inform Mrs. Jordan that her ovaries had been removed

and she first discovered that her ovaries had been removed when she received the anesthesiologist bill after the surgery.

In January, 1977, Mrs. Jordan commenced a civil action against Dr. Schroeder's estate for medical negligence and lack of informed consent in King County Superior Court in Washington state. Dr. Schroeder died in 1975; John Schroeder was appointed personal representative for the estate. The estate obtained summary judgments on the medical negligence claim and on the informed consent cause of action in 1981, the trial court adopting the estate's argument that any evidence admissible on the informed consent claim was barred by the so-called "Deadman statute," RCW 5.60.030, and that Dr. Schroeder had not been medically negligent in prescribing the Theelin hormone. Mrs. Jordan appealed from the 1981 summary judgment on the informed consent, and Division I of the

Court of Appeals of the State of Washington, [illegible] No. 10180-3-I, reversed and remanded for a trial on the merits set for June 13, 1983. Clerk's Papers (hereafter CP) 54.

In her appeal from the 1981 summary judgment Mrs. Jordan argued that evidence of her conversations and transactions with the late Dr. Schroeder should be permitted at the summary judgment motion because "the opposing party may waive the Deadman statute during trial by, for example, not objecting." CP (Opinion of Court of Appeals at 5). Judge Swanson, writing for a unanimous panel of the state court which included Judges Durham and Scholfield, rejected that argument as to the summary judgment motion, but concluded that there were facts admissible in evidence from which a reasonable inference could be drawn that Mrs. Jordan had not been informed of the potential removal of her ovaries prior to the surgery in 1974. Id. The Court of Appeals

also determined that the trial court should have granted Mrs. Jordan's motion for reconsideration on the issue of medical negligence on the basis of Dr. Kenneth Niswander's affidavit, which was submitted after the summary judgment on that issue was initially granted. Id.

Upon remand to King County Superior Court, Mrs. Jordan retained a new attorney for the trial. One of her two prior attorneys had died, and she was no longer represented by her counsel on appeal. On August 9, 1984 the trial by jury on the merits began. Mrs. Jordan's new trial attorney, concerned with insuring an "error-free" record and jury speculation over the lack of any testimony regarding Dr. Schroeder's discussions with Mrs. Jordan about the hysterectomy, proposed an "admonition" for the court to give the jury explaining that the Deadman statute barred

such testimony. August 9 TR 3-16. Counsel for the estate objected to the form of the admonition proposed by Mrs. Jordan's trial counsel arguing that it was a comment on the evidence prohibited by Article 4, Section 16 of the Washington State Constitution. The trial court rejected the estate's objection and read Mrs. Jordan's counsel's admonition to the jury. Ibid; August 9, TR 37-40; 41-42; CP 24.

Based on the court's reading of his admonition, Mrs. Jordan's attorney assumed that neither party would offer evidence of any statements by or transactions with the late Dr. Schroeder as prohibited by the Deadman's statute. Thus, in opening statement, Mrs. Jordan's counsel did not refer to any statements by or transactions with Dr. Schroeder. August 8, TR 43-61.

However, the estate's counsel promptly waived the protection of the Deadman's

statute in opening statement. The estate referred to one of Mrs. Jordan's office visits to Dr. Schroeder in 1974, stating that:

> . . .she was admitted to Seattle General Hospital with her first episode of a massive uterine hemorrhage. At that time, she refused still to have the hysterectomy, and throughout the course of treatment by Dr. Schroeder, he kept saying, "you've got the fibroids, you've got the abnormal bleeding" and recommended hysterectomy which she refused. August 9, TR 68.

A few moments later, in referring to the actual operation itself, the estate's attorney said that "three weeks later, she hemorrhaged again. Back in the hospital. This time she agreed. The hysterectomy was performed February 21, 1974." Id. Mrs. Jordan's trial counsel made no motions that the estate had waived the Deadman statute in opening statement.

The estate also waived the Deadman statute during the course of the trial by questioning several of its own experts as to statements by or transactions with Dr. Schroeder. The estate called Dr. Raymond J. Clark of the University of Washington and Swedish Hospital as an expert in obstetrics and gynecology. Using Dr. Schroeder's medical records, previously offered into evidence by plaintiff, counsel for the estate asked Dr. Clark, "did it appear from Dr. Schroeder's records both a D and C and hysterectomy were advised on that first visit?" (to Dr. Schroeder in 1967) Answer, "Yes, yes, he did recommend both procedures." II TR 269. Immediately thereafter, counsel for the estate focused on the abdominal hysterectomy surgery in 1974, and asked Dr. Clark, "does it appear from your review of the operative report by Dr. Schroeder he considered leaving the tubes and ovaries?"

Answer, "Well, I would have to interpret his statement, as I recall, that he evaluated the status of the ovary during the surgery as meaning that he had made a decision during the operative procedure that he felt removal of the ovaries was necessary to cure this patient and to avoid a subsequent operation which would have been much more serious." II TR 305.

After Dr. Clark, the estate called Mitzi Kunitsugu, Dr. Schroeder's office nurse as the next defense witness. She testified that Dr. Schroeder would always tell his patients about hysterectomies, and when asked on direct examination about what Dr. Schroeder told Mrs. Jordan, Ms. Kunitsugu said "well, he told every patient that had a hysterectomy." II TR 349. Although plaintiff's counsel objected that it was a non-responsive question, he did nothing to

pursue the Deadman's issue with regard to that witness.

The last expert witness called by the estate was Dr. Charles D. Stipp, a gynecologist at the University of Washington. The estate again waived the Deadman's statute by inquiring of him on direct examination as follows: "Question: One further matter. From your review of the records, is there any documentation of actual conversations between Dr. Schroeder and Mrs. Jordan prior to surgery with respect to the risks and the benefits and alternatives to surgery? (Emphasis added.) Answer: I don't recall anything in the records concerning any discussion of that nature." II TR 368. On redirect, estate's counsel followed-up by asking "can you tell from the records what was or what was not discussed with Mrs. Jordan prior to surgery? (Emphasis added.) Answer: No." II TR 373. At no time during

the trial did Mrs. Jordan's trial counsel pursue motions regarding the estate's waiver of the Deadman statute. Consequently, although the Court of Appeals had earlier acknowledged that the Deadman statute may be waived, trial counsel for Mrs. Jordan never pursued the issue of waiver and prejudiced his client's claim because of the lack of admissible evidence on the issue of informed consent.

The trial court record also reveals severe deficiencies with regard to trial counsel's presentation of Mrs. Jordan's case. In opening statement, Mrs. Jordan's counsel referred to his client as being "hypertense" and suggested he was not intelligent enough to understand the medical evidence in this case. August 8, TR 46, 49. Although he called five medical doctors as witnesses on behalf of Plaintiff, he never provided any of them with a complete set of all of Mrs.

Jordan's medical records prior to trial so that they could prepare adequately for cross-examination, see, e.g., August 8, TR 13-15, 18-20, 22-23, 37-38, 59, 133. Moreover, Mrs. Jordan's trial counsel offered into evidence all of Mrs. Jordan's records, without seeking to expunge all of the opinions of Mrs. Jordan's prior treating physicians. August 13, TR 2-3; CP and Supplemental CP. Furthermore, counsel's failure to object occurred even though the trial court acknowledged that portions of Mrs. Jordan's medical records would be inadmissible pursuant to Young v. Liddington, 50 Wn.2d 78, 309 P.2d 761 (1957). Mrs. Jordan's trial counsel also failed to object to the estate's motions to portions of Mrs. Jordan's medical records. August 8, TR 16-24. Defense counsel was able to use those same records to impeach plaintiff's experts by the inadmissible hearsay opinion of her prior

treating physicians, none of whom were called to testify.

Finally, plaintiff's counsel took no exceptions to any of the jury instructions and did not ask that closing argument be recorded.

The jury deliberated for approximately four hours and returned a defense verdict on August 17, 1984. The trial court entered judgment on the verdict on August 31, 1984 and it is from that judgment that the Petitioner, Nettie Jordan, seeks to have reversed for a new trial.

ARGUMENT

The Petitioner had the right to retain competent civil counsel under the V, VII and XIV Amendments to the United States Constitution, and the Washington State Court of Appeals decision finding that no such right exists conflicts with a decision by a Federal Court of Appeals.

A civil litigant is entitled to a constitutionally fair jury trial and due process of law under the United States Constitution. Jacob v. New York, 315 U.S. 752, 62 S.Ct. 854, 86 L.Ed.2d 1166 (1942); U.S. Const. Amends. VII and XIV. Implicit in due process is the right to retain competent counsel during a jury trial. See e.g. Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); Cook v. United States, 267 U.S. 517, 45 S.Ct. 390, 69 L.Ed. 767 (1925); Potashnick v. Port City Construction Company, 609 F.2d 1101 (5th Cir. 1980), cert. denied, 449 U.S. 820 (1980). A litigant's right to counsel in a complex civil trial is implicit in due process because it is virtually impossible for a litigant to secure a meaningful opportunity to be heard without the meaningful assistance of competent counsel. See generally, Potashnick v. Port City Construction, supra.

In examining Petitioner's case, it is obvious that Mrs. Jordan was not afforded that opportunity at the case at bench. Testimony about the information Dr. Schroeder did or did not provide Mrs. Jordan regarding her abdominal hysterectomy was critical to establishing Mrs. Jordan's lack of informed consent. That Mrs. Jordan's testimony on this point was critical is shown by the state Court of Appeals's reversal of the 1981 summary judgment on the basis of Mrs. Jordan's affidavits. Supplemental CP. Washington State recognizes that the protection can be waived. King v. Clodfelter, 10 Wn.App. 514, 518 P.2d 206 (1974). At trial Mrs. Jordan's attorney should have pursued a legal ruling that the estate had waived the Deadman's statute. Further, counsel's failure to provide copies of all medical records to his expert witnesses in preparation for trial and the

offering into evidence of those records without deleting their hearsay portions opened up Mrs. Jordan and her expert witnesses to extensive cross-examination on inadmissible evidence. To correct these errors the remedy must be a new trial to allow Mrs. Jordan the opportunity to be heard.

Commissioner Jordan, speaking for the Washington Court of Appeals and the Washington Supreme Court, did not reach the issue of the propriety of counsel's actions because the Commissioner interpreted Evitts v. Lucey, 469 U.S. ____, 105 S.Ct. 830, 836 Note 7, 83 L.Ed.2d 821 (1985), rev. denied, 105 S.Ct. 1783 to mean that "the right to effective assistance of counsel is dependent upon the constitutional right to counsel". However, Petitioner maintains that the right to counsel is not the issue before the court; rather, it is her due process and right to a

fair jury trial under Amendments V, VII and XIV of the United States Constitution. Therefore, the Washington State Court of Appeals and its decision conflicts with a decision of the 5th Circuit in Potashnick, supra, in this case regarding a critical due process right.

CONCLUSION

For the reasons suggested above, the Petition for Certiorari should be granted. The case presents a conflict between the state court decision and a federal court of appeals decision providing grounds under Rule 17.1(b). The constitutional issue involving the due process clauses presents another basis for granting the petitioner under Rule 17.1(c).

DATED this 24th day of November, 1986.

Respectfully Submitted,

APPELWICK, TRICKEY, SLUITER & SPICER

Michael J. Trickey
Counsel of Record

APPENDIX

No. 15422-2-I/1 RULING

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

NETTIE JORDAN, Appellant, v. JOHN SCHROEDER, as Personal Representative for Estate of Herman Schroeder, Respondent.	)	NO. 15422-2-I COMMISSIONER'S RULING GRANTING MOTION ON THE MERITS

Nettie Jordan appeals from a judgment entered in favor of the treating physician in a medical malpractice lawsuit. Respondent John Schroeder, as personal representative for Dr. Herman Schroeder, has filed a motion on the merits to affirm. The commissioner has heard oral argument and has determined that the motion should be granted.

No. 15422-2-I/2 RULING

FACTS

In 1967, Mrs. Jordan visited Dr. Herman Schroeder because she was concerned about the length of her menstrual periods. He diagnosed uterine fibroids and prescribed Theelin, and injected estrogen. This estrogen therapy continued until November of 1971. Throughout this period, and until February, 1974, Schroeder recommended that Mrs. Jordan have a hysterectomy, which she refused. In early February, 1974, Jordan entered Seattle General Hospital's emergency room with acute uterine hemorrhaging. She was treated with drugs, again refused surgery and was discharged two days later. Two weeks later, Jordan again was admitted to Seattle General Hospital with the same problem. At that time she agreed to the surgery and signed a "Medical/Surgical Request and Consent" form which authorized Schroeder to

perform surgical treatment and any other procedures he judged necessary for the agnosis and treatment of her condition. Schroeder performed a hysterectomy and also removed Jordan's ovaries and fallopian tubes.

Schroeder died in October, 1975.

Jordan filed this lawsuit in January, 1977, alleging negligence and lack of informed consent. Schroeder's estate moved for summary judgment on both causes of action; summary judgment was granted in 1981. Jordan appealed and this court reversed and remanded for trial on the merits in Cause No. 10180-3-I. This court's decision rejected Jordan's argument that the deadman statute did not apply to prevent her from testifying to conversations and transactions with Schroeder, but did hold that there were questions of fact whether there had been

negligence and whether Jordan had given informed consent to the surgical procedures.

Trial after remand was held in August, 1984. Jordan had hired a new attorney. At that attorney's request, the trial court admonished the jury that Jordan and her husband would not be able to testify about conversations and transactions with Schroeder because of the deadman statute. In opening argument and at trial, Schroeder's attorney, without objection, referred to statements made by Schroeder about the necessity for surgery. The jury returned a defense verdict on August 17, 1984. Jordan appeals and presents three issues.

ISSUES

1. May Jordan raise the issue of whether Schroeder's counsel waived the deadman statute, RCW 5.60.030, for the first time on appeal?

2. Did the trial court err in "commenting on the evidence" by referring to Jordan's claims based on informed consent and medical negligence?

3. Was Jordan denied her right to a fair trial because of ineffective assistance of counsel who allegedly failed to adequately prepare witnesses, failed to point out the alleged waiver of the deadman statute, and offered exhibits containing allegedly inadmissible hearsay?

CRITERIA FOR DETERMINING WHETHER TO GRANT A MOTION ON THE MERITS

RAP 18.14(e) provides:

> A motion on the merits will be granted in whole or in part if the appeal or any part thereof is determined to be clearly without merit. In making these determinations, the . . . commissioner will consider all relevant factors including whether the issues on review (1) are clearly controlled by settled law, (2) are factual and supported by the evidence, or (3) are matters of judicial discretion and the

> decision was clearly within the discretion of the trial court.

In applying these criteria, the commissioner determines that the appeal is clearly without merit.

DECISION

ISSUE ONE

Jordan first contends that Schroeder's estate waived the deadman statute by referring to transactions between Schroeder and Jordan. For example, in her brief Jordan cites to Schroeder's opening statement, in which his attorney referred to his recommendation of a hysterectomy, and to testimony relating to Schroeder's medical records. There is no indication in the record that Jordan's attorney objected to the statements or to the admission of any of this testimony.

RAP 2.5(a) provides:

> (a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction.

Although Jordan argues that an exception can be made when the error results in a denial of procedural due process, she has not shown how the admission of testimony, even if in violation of the deadman statute, did so. The present case is distinguishable from Esmieu v. Scrag, 88 Wn.2d 490, 563 P.2d 203 (1977), cited by Jordan. In that case the court held there was a violation of procedural due process where a hearing was held and testimony taken without notice to the defendants or their counsel. There is no

allegation here that Jordan was denied a hearing without proper notice. Since the claim of waiver does not fall within any of the exceptions set forth in RAP 2.5(a), it cannot be raised for the first time on appeal.

ISSUE TWO

Jordan next argues the trial court impermissibly commented on the evidence at the close of all testimony in violation of Const. Art. 4, §16. Prior to excusing the jury for the day, the trial court stated:

> Those instructions will be the law that the Court will at that time have decided on and be available for you. The Court will read those instructions to you on Friday morning, and you will be able to follow right along with it on those instructions. The plaintiff will have his argument and the issues being twofold:
>
> One issue was, Was there any negligence in the sense of the standard of practice on the instructions given to you? And the second issue will be one related to informed consent. Did or did not

> Nettie Jordan get informed from Dr. Schroeder, with all the evidence in the case and this matter being a certain risk as to the circumstances as it finally turned out in connection with this operation?
>
> . . .
>
> I wanted to tell you about this today so you'd know what to look for. . .[Y]ou should. . .be ready and refreshed and able to consider all of the evidence in light of the Court's law.
>
> I told you at the beginning of the case, and I reiterate now, the evidence that you are to consider consists of the testimony of the witnesses and likewise the exhibits admitted into evidence, all of which will be available to you.

A trial court's statements are an impermissible comment on the evidence if the jury can infer from what the court said or did not say that it personally believed or disbelieved the testimony in question. Egede-Nissen v. Crystal Mountain, Inc., 93 Wn.2d 127, 606 P.2d 1214 (1980). No inference either for or against Jordan can be

drawn from the above-mentioned statement and thus there was no comment on the evidence.

It should also be noted that at the beginning of the trial the court told the jury:

> I may have told some of you earlier about the constitutional prohibition against the Court commenting on the evidence, and I've told you I mean it sincerely. I'll try not to comment in any way. If it would seem to you I would comment during the trial or the giving of the instructions, disregard the comments entirely.

In addition, the trial court instructed the jury by giving WPI 1.01, which stated in part:

> The law does not permit me to comment on the evidence in any way and I have not intentionally done so. If it appears to you that I have so commented, during either the trial or the giving of these instructions, you must disregard the comment.

Thus, if there was error, it was corrected.

Balandzich v. Demeroto, 10 Wn.App. 718, 725, 519 P.2d 994 (1974).

ISSUE THREE

Jordan's primary contention is that she was denied effective assistance of counsel because her trial attorney did not make proper objections (e.g., to the introduction of evidence of transactions and conversations with Schroeder), failed to provide her witnesses with a complete set of medical records, introduced her entire medical record without seeking to delete opinions and failed to except to the jury instructions.

Jordan cites no authority of effective assistance of counsel extends to civil cases. In Seventh Elect Church v. Rogers, 34 Wn.App. 105, 120, 660 P.2d 280 (1983), the court stated that a claim of ineffective assistance of counsel in a civil case based on "the sixth and fourteenth amendments to the United

States Constitution is frivolous." Jordan appears to base her claim on procedural due process rights. This claim, however, is clearly without merit.

The United States Supreme Court has recognized that the right to effective assistance of counsel is dependent on the constitutional right to counsel. Evitts v. Lucey, ___ U.S. ___, ___ L.Ed.2d ___, 105 S.Ct. 830, 836 n.7 (1985). Unless a litigant is constitutionally entitled to an attorney, there is no recognized right to effective assistance of counsel. Wainwright v. Torna, 455 U.S. 586, 587-88, 71 L.Ed.2d 475, 102 S.Ct. 1300 (1982); accord, Seventh Elect Church v. Rogers, supra; see also In Re Moseley, 34 Wn.App. 179, 184, 660 P.2d 315 (1983).

Legal counsel is "not available as a matter of constitutional right to the

unimprisoned in civil cases." Hooks v. Wainwright, 775 F.2d 1433, 1437 (11th Cir. 1985). A civil litigant has no constitutional right to counsel unless the individual is being deprived of some significant liberty interest. In Re Lewis, 88 Wn.2d 556, 558, 564 P.2d 328 (1974); In Re [illegible]scier, 84 Wn.2d 135, 138-39, 524 P.2d 906 (1974); In Re Adoption of Hernandez, 25 Wn.App. 447, 452, 607 P.2d 879 (1980). "Absent special statutory guarantees, the appointment of counsel is constitutionally required only when procedural fairness demands it." Tetro v. Tetro, 86 Wn.2d 252, 253, 544 P.2d 17 (1975).

Here, Jordan voluntarily commenced this medical malpractice action against Schroeder's estate to recover damages for the alleged lack of informed consent and alleged medical negligence committed by Schroeder

during surgery. This case does not involve a contest between the unequal powers of the state and a private individual. Under these circumstances, the dispute did not involve matters of such a fundamental nature as to require appointment of counsel. In Re Adoption of Hernandez, supra; In Re Moseley, supra. Since Jordan had no legally recognized right to counsel, she could not be deprived of the effective assistance of counsel. Wainwright v. Tornay, supra. Now, therefore, it is hereby

ORDERED that the motion on the merits is granted and the judgment of the trial court is affirmed. It is further

ORDERED that Schroeder's request for attorney fees pursuant to Streater v. White, 26 Wn.App. 430, 613 P.2d 187 (1980), is denied.

Done this 13th day of January, 1986.

No. 15422-2-I/15 RULING

LARRY A. JORDAN
Court Commissioner

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

NETTIE JORDAN, Appellant, v. JOHN SCHROEDER, as Personal Representative for Estate of Herman Schroeder, Respondent.	)	NO. 15422-2-I Division One ORDER DENYING MOTION TO MODIFY

Nettie Jordan has filed a motion to modify a commissioner's ruling granting a motion on the merits and affirming the decision of the trial court. A panel of the court has considered the matter pursuant to In Re Marriage of Wolfe, 99 Wn.2d 531, 663 P.2d 469 (1983) and RAP 17.7 and has determined that the motion should be denied for the reasons set forth in the

commissioner's ruling. Now, therefore, it is hereby

ORDERED that the motion to modify is denied.

Done this 27th day of February, 1986.

SCHOLFIELD, C.J.

GROSSE, J.

COLEMAN, J.

THE SUPREME COURT
State of Washington
Olympia
98504-0611

Reginald H. Schriver
Clerk

753-6080
Area 206

May 6, 1986

Appelwick, Trickey & Sluiter
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Williams, Lanza, Kastner & Gibbs
Ms. Mary H. Spillane
Ms. Elizabeth Christianson
P.O. Box 21926
Seattle, Washington 98111

Re: Supreme Court No. 52635-4 - Nettie Jordan v. John Schroeder
Court of Appeals No. 15422-2-I

Counsel:

The above entitled petition for review was considered by the Court on its May 6, 1986, petition for review calendar.

The petition was denied by order number 147/208 filed on May 6, 1986.

Very truly yours,

REGINALD N. SHRIVER
Supreme Court Clerk

crf

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

NETTIE JORDAN,	)	
	)	
Appellant,	)	MANDATE
	)	
v.	)	NO. 15422-2-I
	)	
JOHN SCHROEDER, as Personal Representative for Estate of Herman Schroeder,	)	King County No. 820679
	)	
Respondent.	)	

The State of Washington to: The Superior Court of the State of Washington in and for King County

This is to certify that the Court of Appeals of the State of Washington, Division I, considered and granted a motion on the merits in the above entitled case on January 13, 1986. Accordingly, this cause is mandated to the Superior Court from which this appeal was taken for further proceedings

in accordance with the determination of that court.

Mandate after motion for dismissal granted. Petition for Review denied May 6, 1986 pursuant to RAP 14.4 costs are taxed as follows: One Hundred Eighty-Five and 20/100 ($185.20) Dollars against Appellant in favor of Respondent.

cc: Nancy Bradburn-Johnson
Nettie Jordan
Mary H. Spillane

IN TESTIMONY WHEREOF, I have hereunder set my hand and affixed the seal of said Court at Seattle, this 15th day of May, 1986.

RICHARD D. TAYLOR, Clerk
of the Court of Appeals,
State of Washington,
Division I

No. 86-924

IN THE

Supreme Court of the United States

October Term, 1986

NETTIE JORDAN,
Petitioner,

v.

JOHN SCHROEDER, as Personal Representative for the ESTATE OF HERMAN SCHROEDER, M.D.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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January 30, 1987

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IN THE

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WASHINGTON

I. RESPONSE TO QUESTIONS PRESENTED FOR REVIEW

Respondent respectfully submits that there are two questions presented by the Petition for Writ of Certiorari:

1. Whether the petition should be dismissed because it was not filed within ninety days after the Washington Supreme Court entered the order which fully determined the rights of the parties and which was not subject to further review by any Washington court?

2. Whether a civil plaintiff in a medical malpractice action involving a purely private dispute between two private parties has a Constitutional right to the effective assistance of hired counsel?

II. STATEMENT OF THE CASE

A. Factual Background.

This medical malpractice action was commenced in 1977 against the estate of Dr. Herman Schroeder, Respondent. Petitioner, Mrs. Jordan, claimed that Dr. Schroeder was negligent in and failed to obtain her informed consent to both his administration of estrogen (Theelin) injections from 1967 to 1971 and the removal of her fallopian tubes and ovaries during her hysterectomy in February 1974.

Mrs. Jordan first saw Dr. Schroeder on April 6, 1967. He diagnosed large uterine fibroids, masses composed mainly of fibrous or fully developed connective tissue. (Trial Exhibit 2; Report of Proceedings ("RP") 212:25-213:6.) His records indicate he recommended a dilatation and curettage, abdominal hysterectomy and Theelin injections. (RP 217:15-18; 220:8-12; Trial Exhibit 2.)

Mrs. Jordan continued to see Dr. Schroeder from May 26, 1967 to November 29, 1971, and received Theelin injections approximately two times per month for treatment of her documented, chronically low estrogen levels. (RP 276:16-277:6; 337:7-15; 355:16-20.) During this time, Dr. Schroeder's records reflect that he continued to recommend a hysterectomy which Petitioner steadfastly refused. He saw her periodically throughout 1972 and 1973, and his records note that he persisted in his recommendation of a hysterectomy. (RP 218:6-219:8.)

Mrs. Jordan presented to the emergency room on February 3, 1974 with acute uterine hemorrhage from her fibroids. She was treated conservatively and discharged two days later. (Trial Exhibit 4.) On February 18, 1974, she was readmitted with another acute episode of uterine hemorrhage. This time, she agreed to have a hysterectomy. Prior to this procedure, she signed a medical/surgical request and consent form. This form authorized the attending physician to administer surgical

treatment and to do "any other therapeutic procedures that in [his] judgment may be deemed as necessary for the diagnosis and treatment of the patient's condition." (Trial Exhibit 4.)

The hysterectomy was performed on February 21, 1974. During the surgery it became apparent that the fallopian tubes and ovaries would have to be removed because they were "densely engulfed by fibroids." (Trial Exhibit 4.) Had the ovaries not been removed, the circulation of blood to the ovaries would have been so distorted that there would not have been a good, functioning ovary remaining. (Trial Exhibit 4.)

B. Procedural Background.

Trial commenced on August 10, 1984. Asserting the protection of the Deadman's Statute, RCW 5.60.030, Respondent brought a motion *in limine* to exclude testimony by the Jordans regarding any transactions or conversations with the decedent, Dr. Schroeder. (Defendant's Clerk's Papers ("CP") 48-57.) This motion was granted. (RP 23:8-24:9.) The court also granted Petitioner's motion for an explanatory instruction and instructed the jury that the Jordans would not be able to testify about transactions with the deceased and that the jury should draw no inferences either way from the lack of such testimony. (CP 24.)

At trial, Petitioner's counsel called numerous witnesses: the Jordans, three of Mrs. Jordan's treating physicians — Dr. Norman Brown, Dr. Alfred Magar and Dr. Rodney Cook — and two independent experts — Dr. Kenneth Niswander and Dr. Charles Goodner. Respondent, in turn, called Dr. Schroeder's office nurse, the executor of his estate, and three independent experts — Dr. Raymond Clark, Dr. Charles Stipp, and Dr. Edwin MacCamy.

On August 17, 1984, the case was submitted to the jury. After deliberating approximately four hours, the jury returned its verdict for Respondent. No post-trial motions were made. Judgment on the verdict was entered on August 31, 1984.

Petitioner then filed a notice of appeal and retained new counsel. The only issue presented to the Washington appellate courts was whether Respondent should be put to the burden, expense and inconvenience of a new trial because Petitioner, unhappy with the result and with the counsel she selected and retained, claimed ineffective assistance of counsel.

On appeal, Petitioner asserted several instances of alleged ineffective assistance of counsel. For example, Petitioner claimed that trial counsel should have excepted to the jury instructions. Yet, she did not urge that any instructions were erroneous and cited no authority indicating that an exception would be well taken. She urged that Respondent waived the Deadman's Statute, RCW 5.60.030, and that her trial counsel failed to object to the admission of such evidence. See discussion *infra* at 14-15. She further contended that portions of the medical records were inadmissible, but did not point to a single entry which should have been excised.

Petitioner also criticized her trial counsel's reference to her as "hypertense", when he actually said she had "hypertension" (high blood pressure) which was part of her claimed damages. (RP 46:2-12; 79:7-12.) She further contended that her trial counsel failed to provide copies of all her medical records to the expert witnesses. Yet, the selection of materials to be provided to an expert is a matter of trial tactics and attorney work product. *See Sporck v. Piel*, 759 F.2d 312 (3rd Cir. 1985). In short, Petitioner alleged nothing more than her appellate counsel's disagreement with her trial counsel's technique and trial tactics.

Respondent brought a motion on the merits in the Washington Court of Appeals. Pursuant to the Washington Rules of Appellate Procedure ("RAP"), Rule 18.14, the Court Commissioner dismissed the appeal as "clearly without merit", and ordered that the judgment of the trial court is affirmed. Petitioner then brought a motion to modify the Commissioner's Ruling. RAP 17.7; RAP 18.14(i). A panel of the judges of the Washington Court of Appeals denied the motion to modify. Petitioner then sought discretionary review by the Washington Supreme Court. RAP 13.3-.4. By order dated May 6, 1986, a panel of five justices of the Washington Supreme Court refused to accept review.

III. REASONS FOR DENYING THE WRIT

Respondent respectfully submits that the Petition for Writ of Certiorari should be denied for want of jurisdiction. The petition was not filed within the time provided by law. 28 U.S.C. § 2101(c); Rule 28.2, Rules of Supreme Court. On May 6, 1986, the Washington Supreme Court entered an order fully determining the rights of the parties and not subject to further review by any state court. Petitioner failed to file her petition within ninety days of this date.

The petition should also be denied because this is not a case with special and important reasons for granting certiorari. The Commissioner of the Washington Court of Appeals did not decide an important question of federal law which should be settled by this Court nor did he decide a federal question in a way in conflict with applicable decisions of this Court or a federal court of appeals. *See* Rule 17.1(b), 17.1(c), Rules of the Supreme Court.

This case involves a private dispute between private parties sounding in tort. This civil action involved neither state-instituted proceedings subject to close scrutiny nor any deprivation of Petitioner's life, liberty or property by way of application of any state or federal statute.

A. ***The Petition Is Jurisdictionally Out of Time — It Was Filed Over Ninety Days After the Final Order of the Washington Supreme Court Which Was Not Subject to Further Review.***

The following chronology demonstrates that the petition was not filed within the time allowed by 28 U.S.C. § 2101(c):

August 31, 1984	Judgment entered on jury verdict — Superior Court of Washington.
January 13, 1986	Commissioner's Ruling ordering that "the judgment of the trial court is affirmed" — Washington Court of Appeals.
February 27, 1986	Order Denying Motion to Modify the ruling — Washington Court of Appeals.
May 6, 1986	Order Denying Petition for Discretionary Review — Washington Supreme Court.
May 15, 1986	Mandate signed notifying the Superior Court of the January 13, 1986 ruling dismissing the appeal — Washington Court of Appeals.
August 4, 1986	Last day to file Petition for Writ of Certiorari (ninety days from May 6, 1986).
August 13, 1986	Petition for Writ of Certiorari mailed.
August 20, 1986	U.S. Supreme Court Clerk returns the petition as out of time.
November 25, 1986	Motion to Direct Clerk to File Petition for Writ of Certiorari to the Washington Court of Appeals.

Under 28 U.S.C. § 2101(c) and Rule 20.4, Rules of Supreme Court, the petition was not timely filed. 28 U.S.C. § 2101(c) provides, in part:

> Any other . . . writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. . . .

Rule 20.4, Rules of Supreme Court, further provides that the time for "filing a petition for writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, *and not from the date of issuance of the mandate* (or its equivalent under local practice)." (Emphasis added.)

This Court has held that the judgment, decree or order of a state appellate court is final and subject to review

> when it ended the litigation by fully determining the rights of the parties, so that nothing remained to be done by the lower court except the ministerial act of entering the judgment which the appellate court had directed. . . .
>
> . . .
>
> For the purpose of the finality which is prerequisite to a review in this Court, *the test is not whether under local rules of practice the judgment is denominated final . . ., but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that adjudication is not subject to further review by a state court.* . . . Where the order or judgment is final in that sense, the time for applying to this Court runs from the date of the appellate court's order . . .

Department of Banking v. Pink, 317 U.S. 264, 267-68 (1942) (emphasis added, citations omitted).

On May 6, 1986, the Washington Supreme Court denied Petitioner's application for discretionary review. This order was not subject to further review by that court or any other state court. Therefore, the time for applying to this Court for review began running on May 6, 1986. *Id.* The Petition for Writ of Certiorari filed on August 13, 1986 was not timely. That petition should, therefore, be denied.

Unlike *Puget Sound Power & Light Co. v. King County*, 264 U.S. 22 24-25 (1924), this case is governed by the Washington Rules of Appellate Procedure. RAP 1.1(g) and RAP 18.22. Under current Washington appellate procedure, the trial court judgment is expressly affirmed by the appellate court's opinion and not by the appellate court clerk's subsequently recorded judgment. In *Puget Sound Power & Light*, this Court held, under the law of Washington then in effect, that the time for filing a writ in this Court ran from entry of the judgment of the Washington Supreme Court by the clerk of that court and not from the date of the court's opinion. The then-effective Washington statute expressly required a formal, ministerial entry of the judgment by the clerk. However, that statute has been superseded by RAP 1.1(g) and RAP 18.22.

Under the present Washington appellate procedure and rules, the May 6, 1986 order of the Washington Supreme Court refusing to accept discretionary review of this case was not reviewable. *See generally*, RAP 12.3, 12.4, and 12.5(b). Upon that order, the rights of the parties were fully determined in the Washington appellate courts. No review lies from the denial of discretionary review by the Washington Supreme Court as the mandate issues directly "upon denial of the petition for review." RAP 12.5(b)(3).

The May 6, 1986 order marked the end of this litigation in the Washington courts. The Supreme Court had refused to accept review. The Court of Appeals had already ruled that "it is hereby ORDERED that . . . the judgment of the trial

court is affirmed." *Cf. Puget Sound Power & Light* at 24-25. Nothing remained to be done in the trial court — not even the ministerial act of entering a judgment, because the judgment the trial court had entered on August 31, 1984 had been expressly affirmed.

The subsequent issuance of the mandate merely served as notification of the January 13, 1986 court of appeals decision terminating review. *See State v. Dorosky*, 28 Wn. App. 128, 131, 622 P.2d 402 (1981). RAP 12.5(a) and (b)(3). In Washington, the mandate is not, as urged by Petitioner, a judgment or decree. RAP 12.5(a) defines mandate as "the written notification by the clerk of the appellate court to the trial court and to the parties of an appellate court decision terminating review". Moreover, Rule 20.4 of this Court contemplates this distinction and expressly provides that the time prescribed by 28 U.S.C. § 2101(c) for filing of the petition does not begin to run from the date of the subsequent mandate, but from the date of the judgment or decree sought to be reviewed. That date was May 6, 1986.

For this reason, the Petition for Writ of Certiorari should be denied.[1]

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[1] The petition should also be denied for failure to conform to the Rules of the Supreme Court of the United States. The type size of the appendix does not comply with Rule 33.1(c); the petition has no cover as required by Rule 33.2(b); and the ordering of the Question Presented for Review does not conform to Rule 21.1. Rule 21.2 requires that the petition not be accepted; and pursuant to Rule 33.7 dismissal is an appropriate sanction.

Denial is especially appropriate here where Petitioner not only did not timely file the petition within ninety days, but also did not file her Motion to Direct Clerk to File Petition for Writ of Certiorari until over ninety days after the Supreme Court clerk had originally refused to accept the petition. Further, Petitioner did not seek leave for an extension of time for filing the petition and has not attempted to show good cause for her failures to conform with 28 U.S.C. § 2101(c) or the rules of this Court.

B. *The Washington Court of Appeals Decision Is Not In Conflict With The Decisions of The Federal Courts of Appeal: A Plaintiff In A Medical Malpractice Action Does Not Have A Constitutional Right To The Effective Assistance of Counsel in a Purely Private Dispute With Her Physician.*

Petitioner urges that the Washington Court of Appeals holding that she has no constitutional right to the effective assistance of counsel retained by her to bring a medical malpractice action is in conflict with the Fifth Circuit Court of Appeals decision in *Potashnick v. Port City Construction Company,* 609 F.2d 1101 (5th Cir. 1980). Several federal courts of appeal have considered this issue and have not recognized a constitutional right to the effective assistance of counsel in a private civil action.

In *Potashnick,* the trial court had restricted one of the litigant's access to his attorney during that litigant's testimony. The Fifth Circuit held that this denial of attorney-client communication impinged upon the litigant's right to retain hired counsel. However, the *Potashnick* court also recognized that this right to retain, and freely communicate with, hired counsel "does not require the government to provide lawyers for litigants in civil matters." *Potashnick* at 1118. This Fifth Amendment due process right to retain hired counsel is not impinged where the plaintiff is neither barred from retaining hired counsel nor denied access to such counsel. *Potashnick* at 1118; *Gray v. New England Telephone & Telegraph Company,* 792 F.2d 251, 256-57 (1st Cir. 1986).

The Washington Court of Appeals decision is not in conflict with *Potashnick.* At trial, Petitioner was represented by counsel she had selected and retained. Petitioner has at no time contended that either the trial court or Respondent prevented her from full, free, and open access to and communication with the counsel of her choice. She does not contend that she was in any way prevented from retaining other or additional hired counsel. To the contrary, she freely exercised her right to retain hired counsel.

Petitioner fails to recognize the distinction between the right to retain and communicate with counsel and a right to appointed counsel. *Potashnick* recognized a civil litigant's right to hire and communicate with counsel but expressly rejected a civil litigant's right to an appointed counsel. This rejection of a civil litigant's constitutional entitlement to appointed counsel necessarily rejects any corresponding right of a civil litigant to the effective assistance of counsel. *See Evitts v. Lucey*, ____ U.S. ____, 83 L.Ed.2d 821, 829 n.7, 405 S.Ct. 830, 836 n.7 (1985). The Washington Court of Appeals reached this same conclusion. There is no conflict.

C. ***The Washington Court of Appeals Did Not Decide an Important Question of Federal Law Which Should Be Settled by This Court: There Is No Fifth Amendment Right to Effective Assistance of Counsel for a Civil Litigant in a Purely Private Dispute.***

Petitioner urges that the Constitution guarantees her the right to "retain *competent* civil counsel." *See* Petition at 16. Apparently this means, if she chooses incompetent or ineffective counsel, then the Constitution guarantees her a new trial.[2] The right of a civil plaintiff to retain and communicate with hired counsel does not stretch that far.

The Eleventh Circuit Court of Appeals when faced with a similar argument stated as follows:

> In effect, the plaintiffs assume that they have a protected right to competent representation in their lawsuit. Simply stated, however, "there is no constitutional or statutory right to effective assistance of counsel in a civil

[2] Petitioner cites the Fifth, Seventh and Fourteenth Amendments in her petition. Yet, Petitioner does not addresss or acknowledge the state action requirement necessary for these amendments to apply. It is difficult, if not impossible, to discern how any state action is involved where Petitioner herself selected, retained and freely communciated with the counsel with whom she is now dissatisfied.

> case." *Watson v. Moss*, 619 F.2d 775, 776 (8th Cir. 1982); *see also United States v. White*, 589 F.2d 1283, 1285, n.4 (5th Cir. 1979); *United States v. Rogers*, 534 F.2d 1134, 1135 (5th Cir.) *cert. denied*, 429 U.S. 940, 97 S. Ct. 355, 50 L. Ed. 2d 309 (1976); *In Re Grand Jury Matter*, 682 F.2d 61, 66 (3d Cir. 1982); *Kushner v. Winterthur Swiss Insurance Co.*, 620 F.2d 404, 408 (3d Cir. 1980). The sixth amendment standards for effective counsel in criminal cases do not apply in the civil context. *White*, 589 F.2d at 1285 n. 4; *Rogers*, 534 F.2d at 1135; *Watson*, 619 F.2d at 776; for that reason, "[a] party . . . does not have any right to a new trial in a civil suit because of inadequate counsel, but has as its remedy a suit against the attorney for malpractice." *Watson*, 619 F.2d at 776; See also *Kushner*, 620 F.2d at 408.

Mekdeci By And Through Mekdeci v. Merrell National Laboratories, 711 F.2d 1510, 1522-23 (11th Cir. 1983). *See also Hooks v. Wainwright*, 775 F.2d 1433, 1438 (11th Cir. 1985) (stating that there is no constitutional right to counsel for litigants in civil cases); *Hullom v. Burrows*, 266 F.2d 547 (6th Cir. 1959); *Dilliplaine v. Lehigh Valley Trust Co.*, 457 Pa. 255, 260, 322 A.2d 114, 117-18 (1974) (Manderino, J., concurring); *Johnson v. Rutoskey*, 472 N.E.2d 620 (Ind. App. 2d Dist. 1984); *Maltby v. Cox Construction Co.*, 598 P.2d 336 (Utah 1979), *cert. denied*, 444 U.S. 945 (1979).

In essence, Petitioner claims that she was deprived of her Fifth Amendment due process rights because her trial counsel's claimed ineffectiveness denied her an opportunity to present her case in a meaningful way. Meaningful opportunity to be heard does not necessarily include the right to counsel, even in some criminal proceedings, and does not constitutionally entitle a civil litigant to an attorney in a civil case. *Hooks v. Wainwright*, 775 F.2d 1433, 1438 (11th Cir. 1985). *Accord, Potashnick* at 1118. It follows, therefore, that there is no Fifth Amendment right to effective assistance of counsel in a civil case. *See Watson v. Moss*, 619 F.2d 775

(8th Cir. 1980). For, as this Court has reiterated, "the right to effective assistance of counsel is dependent on the right to counsel." *Evitts v. Lucey*, 83 L.Ed.2d at 829 n.7, 405 S. Ct. at 836 n.7.

The decision of the Washington Court of Appeals did not involve a significant constitutional question which should be settled by this court. The Constitution does not require Respondent to bear the burden, expense and inconvenience of a new trial simply because Petitioner is now dissatisfied with the counsel she selected and retained. Nor does the Constitution require that a civil defendant be responsible for the quality of a civil plaintiff's attorney's representation. Several of the federal courts of appeal have considered the issue and have uniformly and summarily stated that a civil litigant has no constitutional right to counsel, to have counsel appointed, or to the effective assistance of counsel.[3] *E.g., Mekdeci By And Through Mekdeci v. Merrell National Laboratories*, 711 F.2d 1510, 1522-23 (11th Cir. 1983) and the cases cited therein.

The Petition for Writ of Certiorari should therefore be denied.

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[3] Numerous state courts have held, on various non-constitutional grounds, that a defendant should not be put to the expense and burden of relitigating a civil action simply because plaintiff claims ineffective assistance of retained counsel. *In re Marriage of Ford*, 470 N.E.2d 357 (Ind. App. 3rd Dist. 1984); *Jennings v. Stoker*, 652 P.2d 912 (Utah 1982); *King v. Superior Court*, 138 Ariz. 147, 673 P.2d 787 (1983); *Andrea Dumon, Inc. v. Pittway Corp.*, 110 Ill. App. 3d 481, 442 N.E.2d 574 (1982); *Engelbrechten v. Galvononi & Nevi Bros., Inc.*, 60 Misc. 2d 419, 302 N.Y.S.2d 691 (1969); *Wilson v. Sherman*, 461 P.2d 606 (Okla. 1969); *Scheffer v. Chron*, 560 S.W.2d 419 (Tex. App. 1977).

D. ***No Federal Questions Are Involved In Petitioner's Trial Counsel's Alleged Ineffective Representation.***

Petitioner's allegations of alleged ineffective assistance of counsel concern evidentiary matters and issues of trial strategy, planning and technique. See discussion *supra* at p. 4. None of these allegations raise questions of federal or constitutional law.

Petitioner's primary allegation concerns a claimed waiver of the Washington Deadman's Statute, RCW 5.60.030. However, the Deadman's Statute is not waived unless the estate introduces or fails to object to evidence barred by the statute. *O'Connor v. Slater,* 48 Wash. 493, 93 P. 1078 (1908); *In re Estate of Davis,* 23 Wn. App. 384, 385-86, 597 P.2d 404 (1979). At trial in this case, the estate did not introduce, comment on, or fail to object to any evidence barred by this statute.

RCW 5.60.030 only prohibits testimony of interested or adverse parties who "will either gain or lose by the direct legal operation and effect of the judgment." *Adams Marine Serv. v. Fishel,* 42 Wn.2d 555, 562, 257 P.2d 203 (1953). None of the witnesses whose testimony is claimed by Petitioner to have waived the protection of the statute were interested parties. *E.g., May v. Triple C Convalescent Center,* 19 Wn. App. 794, 799, 578 P.2d 541 (1978).

The admission of Respondent's medical records, testimony regarding the contents of those records, and reference to their contents in opening statement did not waive the protection of the statute. The Deadman's Statute applies to oral testimony, not to admissible, documentary evidence. In *Sanborn v. Dentler,* 97 Wash. 149, 166 P. 62 (1917), a physician's account books and the patient's medical records were not barred by the statute in an action to recover for physician's services. *See also McDonald v. McDonald,* 119 Wash. 396, 206 P. 23 (1917); *Vogt v. Hovander,* 27 Wn. App. 168, 616 P.2d 660 (1979).

Thus, Petitioner's allegations concerning her trial counsel's failure to pursue an alleged waiver of the Deadman's Statute must be resolved under Washington state law. Moreover, unlike a criminal defendant, Petitioner has an appropriate remedy under state tort law for any perceived deficiencies in her trial counsel's representation. *Mekdeci By And Through Mekdeci v. Merrell National Laboratories*, 711 F.2d 1510, 1523 (11th Cir. 1983) and the cases cited therein.

IV. CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court to deny the Petition for Writ of Certiorari to the Washington Court of Appeals.

RESPECTFULLY SUBMITTED this 30th day of January, 1987.

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